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Supreme Court, U.S.
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No. 97-1388

In The

Supreme Court of the United States

October Term, 1997

EDDIE MAYS, et al.,

Petitioners,

v.

CITY OF EAST ST. LOUIS, ILLINOIS, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION

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SUMMARY OF ARGUMENT

The Seventh Circuit correctly determined that the substantive due process approach of the other circuits to have considered the question is outdated. The only issue is whether respondents violated the fourth amendment in pursuing petitioners' car. Under established fourth amendment standards, there was no violation.

Substantive due process does not apply to a claim arising out of the government's failure to protect individuals from the harmful acts of private individuals. The holding in the *DeShaney* case applies to the alleged failure of Officer Cherry to protect the passengers of the Burries' car from his reckless conduct.

Because the Seventh Circuit's analysis of the evidence in this case indicates that it does not believe Officer Cherry acted with deliberate indifference to the rights of the petitioners, granting certiorari would be an act of futility.

ARGUMENT

CERTIORARI SHOULD BE DENIED BECAUSE THE SEVENTH CIRCUIT HAS EFFECTIVELY HELD THAT SUMMARY JUDGMENT WAS PROPER REGARDLESS OF THE STANDARD OF PROOF EMPLOYED.

The parties argued this case in accordance with the current thinking of many of the circuits on the issue of liability for injuries arising out of police pursuits under 42 U.S.C. § 1983. Respondents argued that the majority of circuit courts to have considered the question hold that

the plaintiff must demonstrate that the officer's pursuit of the fleeing suspect "shocks the conscience." See *Fagan v. City of Vineland*, 22 F.3d 1296 (3d Cir. 1994) (en banc). Petitioners argued, consistent with cases such as *Lewis v. Sacramento County*, 98 F.3d 434 (9th Cir. 1996), *cert. granted*, 117 S. Ct. 2406 (1997), that they need only prove that the pursuing officer acted with deliberate indifference to the rights of those injured allegedly as the result of the pursuit.

The Seventh Circuit decided the case on three entirely different bases. None of these bases rests on the question of whether Officer Cherry's conduct shocked the conscience or was undertaken with deliberate indifference to petitioners' rights. Accordingly, regardless of this Court's decision in *Lewis*, the affirmance of the summary judgment for respondents will not be changed. Certiorari should therefore be denied.

A. The Seventh Circuit Held That a Complaint Arising out of an Allegedly Improper Police Pursuit Does Not Implicate Petitioners' Constitutional Rights.

The Seventh Circuit reviewed several decisions from this Court in the last decade as part of its fundamental analysis of whether the "substantive due process" component of the fourteenth amendment may give rise to a claim under 42 U.S.C. § 1983 arising out of improper police conduct in apprehending criminal suspects. Its ultimate conclusion, that the fourth amendment is the sole source of constitutional rights in this context, is amply supported by precedent.

Graham v. Connor, 490 U.S. 386 (1989), for example, holds that the fourth amendment proscription against unreasonable searches and seizures is the sole determinant of whether appropriate force was used in effecting an arrest. This Court later construed *Graham* in *U.S. v. Lanier*, ___U.S.___, 117 S. Ct. 1219 (1997), stating "*Graham* simply requires that if a constitutional claim is covered by a specific constitutional provision . . . the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." 117 S. Ct. at 1228, n.7.

More recently, in *Albright v. Oliver*, 510 U.S. 266 (1994), this Court held that there is no constitutional tort of malicious prosecution unless it leads to an unlawful arrest in violation of the fourth amendment.

Based upon these cases, the Seventh Circuit analyzed whether Officer Cherry's pursuit of the fleeing Burries violated the fourth amendment (A4-A5):

> The traffic violation gave Cherry probable cause to arrest Burries. *Whren v. United States*, 116 S. Ct. 1769 (1996). An arrest following a traffic stop includes not only the driver but also the passengers; their freedom, too, will be restricted, if only until the officers assure themselves that the scene is safe. *Maryland v. Wilson*, 117 S. Ct. 882 (1979). But Burries fled, and the arrest was not completed. *California v. Hodari D.*, 499 U.S. 621 (1991). Plaintiffs do not argue that Cherry lured Burries into a barrier or cul de sac in order to cause a collision, so there was no seizure under the approach of *Brower v. Inyo County*, 489 U.S. 593 (1989). *See Kernats v. O'Sullivan*, 35 F.3d 1171 (7th Cir. 1994); *Donovan v. Milwaukee*, 17 F.3d 944

> (7th Cir. 1994); *Campbell v. White*, 916 F.2d 421 (7th Cir. 1990). Similarly plaintiffs do not contend that in giving pursuit Cherry applied deadly force, which may or may not have been justified under the approach of *Tennessee v. Garner*, 471 U.S. 1 (1985). (Burries' acts endangered his passengers and other cars on the road, which may have justified force to bring his car to a stop, but we need not confront the question. Cf. *Ford v. Childers*, 855 F.2d 1271 (7th Cir. 1988) (en banc).) An automobile on one's tail is some distance from a bullet in the back. The pursued driver has it within his power to avoid injury – indeed, to avoid risk of injury – by slowing to a halt after the officer decides to pursue. *Garner* distinguished a chase from the use of a weapon. So Cherry's actions did not violate the fourth amendment.

The Seventh Circuit's view of the law of "substantive due process" is consistent with this Court's most recent decisions. Its analysis of the uncontested facts concerning the pursuit, as well as the analysis of the district court (see A27-29), demonstrates that Officer Cherry did not violate the fourth amendment in his pursuit of Burries. Thus, there is no conflict with the decisions of other circuits or of this Court.

B. The Seventh Circuit Correctly Applied This Court's Opinion in *DeShaney* to the Facts of This Case.

After assuming for the sake of argument that Officer Cherry's failure to terminate the pursuit out of concern for the occupants of the Burries car was improper, and that the injuries to petitioners in some sense resulted

from that unlawful pursuit, the Seventh Circuit questioned whether the substantive aspects of the fourteenth amendment applied in any event. The court cited this Court's decision in *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189 (1989), and determined that no fourteenth amendment violation occurred. That decision is correct, and serves as an independent basis for upholding the judgment of the district court, irrespective of the question of what standard of proof is necessary to establish a fourteenth amendment substantive due process claim.

In *DeShaney*, a child sued a social welfare agency for failing to protect him from his abusive father. The courts assumed that the agency acted inappropriately and that appropriate action would have sheltered the child from injury. Nonetheless, this Court held that "[respondent's] failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." 489 U.S. at 197.

The Seventh Circuit then analogized Officer Cherry's conduct to the conduct of the social welfare agency (A12):

> Burries was a reckless driver, his flight from the police was a crime. Plaintiffs' injuries were the result of criminal behavior by a private actor – behavior that Officer Cherry tried in vain to suppress.
>
> One can say that Burries' crime was a response to Cherry's attempt to make an arrest, and that the high speed of the flight was attributable to Cherry's decision to pursue. These facts do not make what Burries did less a crime, or less essential to the harm.

The question posed by *DeShaney* is whether the harm to the plaintiff is more directly attributable to the acts of a private individual or the government agency which fails to protect the individual from that harm. In the case of a police pursuit, it is not even a close question. Burries held the key to the plaintiffs' safety in his hands at all times. His initial flight instigated the danger, and his refusal to either stop or at least moderate his driving was the true cause of the plaintiffs' ultimate harm. The plaintiffs in this case were at least as much the victims of "private violence" as the plaintiff in *DeShaney*. Accordingly, this Court's fundamental decision concerning the breadth of the fourteenth amendment obviates any need to address the standard of proof for a substantive due process violation.

C. Even if the Seventh Circuit Followed the "Deliberate Indifference" Standard Advocated by Petitioners, Its Opinion Demonstrates That Cherry Was Not Guilty as a Matter of Law.

The Seventh Circuit discusses the propriety *vel non* of Cherry's conduct at length in the opinion. Even if this Court agrees with plaintiffs that liability can be predicated upon deliberate indifference to their rights, the Seventh Circuit's discussion of a police officer's prerogatives when confronted with a fleeing suspect indicates that Cherry would not be found liable as a matter of law. Consequently, because the outcome of the case will not change, there is no reason for this Court to grant certiorari.

The first discussion of the significance of Officer Cherry's conduct arose in the course of comparing the requirements of the fourth amendment with the more amorphous standards for substantive due process (A10):

> The nation's social and legal traditions do not give passengers a legal right – as opposed to a moral claim – to have police officers protect them by letting criminals escape.

At the end of the majority opinion, the court recognizes that police pursuit of fleeing suspects is part and parcel of legitimate law enforcement and, inferentially, not in any sense an act of deliberate indifference to the rights of others (A14):

> Death and disability haunt law enforcement. Lax law enforcement emboldens criminals and leads to more crime. Zealous pursuit of suspects jeopardizes bystanders and persons accompanying the offender. Easy solutions rarely work, and *ex post* assessments – based on sympathy for those the criminal has injured, while disregarding the risks to society at large from new restrictions on how the police work – are unlikely to promote aggregate social welfare.

The Seventh Circuit's discussion of the desirability of police pursuit of fleeing suspects evidences, at worst, a characterization of pursuits as partially good, partially bad. Society may ultimately determine that the costs associated with police pursuits outweigh the benefits, but that scarcely means that a police officer confronted with a driver recklessly endangering a carload of innocent passengers is deliberately indifferent to the passengers' rights when attempting to bring the driver to heel. One

can always ask whether those passengers are better off left to the mercy of a plainly dangerous motorist. What the Seventh Circuit makes plain is that the officer's choice is, as a matter of law, not the type of conduct which could reasonably be characterized as a substantive due process violation. Thus, granting certiorari and reversing the Seventh Circuit is pointless, since the outcome of the case will not change.

CONCLUSION

For these reasons, respondents the City of East St. Louis and Leland Cherry, respectfully request that this Court affirm the judgment of the United States Court of Appeals for the Seventh Circuit.

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